Office - Supreme Court, U.S.
FILED
SEP
ALEXANDER L. STEVAS,
CLERK

No. 81-2245

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

STATE OF NEVADA,
Petitioner,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

REPLY BRIEF

RICHARD H. BRYAN
Attorney General of Nevada
Supreme Court Building
Carson City, Nevada 89701
(702) 885-4170

E. BARRETT PRETTYMAN, JR.*
Special Deputy Attorney General
815 Connecticut Avenue, N.W.
Washington, D.C. 20006
(202) 331-4685

LARRY D. STRUVE
Chief Deputy Attorney General
Supreme Court Building
Carson City, Nevada 89701
(702) 885-4170

JOHN W. HOFFMAN
HAROLD A. SWAFFORD
Special Deputies Attorney General
290 South Arlington Avenue
P.O. Box 187
Reno, Nevada 89504
(702) 332-4081

Attorneys for Petitioner

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF AUTHORITIES

Cases	Page
Arizona v. *California*, 373 U.S. 546 (1963)	3
Carson-Truckee Water Conservancy District v. *Watt*, 537 F.Supp. 106 (D. Nev. 1982)	6
Colorado River Water Conservation District v. *United States*, 424 U.S. 800 (1976)	3
Diamond v. *Chakrabarty*, 447 U.S. 303 (1980)	4
Fullilove v. *Klutznick*, 448 U.S. 448 (1980)	4
Harris v. *McRae*, 448 U.S. 297 (1980)	4
Hawaii v. *Standard Oil Co. of California*, 405 U.S. 251 (1972)	8
Heckman v. *United States*, 224 U.S. 413 (1912)	3
Jicarilla Apache Tribe v. *United States*, 601 F.2d 1116 (10th Cir.), cert. denied, 444 U.S. 995 (1979)	3
Pyramid Lake Tribe v. *Morton*, 354 F.Supp. 252 (D.D.C. 1973)	6
Rostker v. *Goldberg*, 453 U.S. 57 (1981)	4
United States v. *Alpine Land and Reservoir Co.*, 503 F.Supp. 977 (D. Nev. 1980)	6
United States v. *California and Oregon Land Co.*, 192 U.S. 355 (1904)	3
United States v. *Minnesota*, 270 U.S. 181 (1926)	3
United States v. *Nevada*, 412 U.S. 534 (1973)	4, 8
United States v. *Rutherford*, 442 U.S. 544 (1970)	4

Miscellaneous	
1B Moore's *Federal Practice*	3
Rule 21.1(a), Supreme Court Rules	3
Stern & Gressman, *Supreme Court Practice* (BNA 5th ed. 1978)	4
Washoe Project Act, 43 U.S.C. § 614	6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-2245

STATE OF NEVADA,

Petitioner,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

REPLY BRIEF

Respondents Pyramid Lake Paiute Tribe of Indians ("the Tribe") and the United States argue that the legal issues presented by the Petitions of the State of Nevada (No. 81-2245) and the Truckee-Carson Irrigation District (No. 81-2276) ("TCID") do not warrant review by this Court.

Sixteen States, with populations totalling some 63 million people, disagree.[1]

We submit that the serious concern expressed by these States—including not only those in the West but States like Indiana and Mississippi with interests far broader than water rights—is entitled to great respect by this Court. It certainly transcends the view of the United States, which apparently feels called upon to address its role as representative of the interests of Newlands Project beneficiaries and those of the Tribe in the *Orr Ditch* proceedings.

---

[1] These include Petitioner Nevada and the following States whose Attorneys General have filed *amicus curiae* briefs supporting grants of certiorari: Arizona, California, Idaho, Indiana, Mississippi, Montana, Nebraska, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah and Wyoming.

Neither the United States nor the Tribe cites statutes or judicial decisions for their support of the Ninth Circuit's res judicata ruling as it relates to TCID. Instead, the Tribe cites two paragraphs from the Restatement of Judgments—one in the 1942 version of the Restatement and another in the updated 1982 version—and the United States cites the same 1982 version and Moore's Federal Practice.

As to the 1942 version, two points should be made. The first is that it was not carried forward to 1982, thus indicating a shift from the strict law of pleadings which prevailed earlier. The second is that even if the 1942 version still set forth controlling law, it would not help the Tribe. The 1942 Restatement provided that non-adversarial parties under the pleadings were not bound upon matters which, *inter alia*, they had no "opportunity to litigate." As noted by the Tribe itself, the "right, power and capacity" of Indian tribes to litigate on their own behalves existed long before *Orr Ditch*. What the Tribe fails to note is that this record demonstrates beyond peradventure of a doubt that it had timely knowledge of the *Orr Ditch* case, it had the wherewithal to intervene, and it in fact did intervene at a later stage in the proceedings.[2] Therefore, even under the outmoded 1942 version of the Restatement, the Tribe would be bound by the all-inclusive *Orr Ditch* Decree.

As to the 1982 Restatement (Second), it does not support the Tribe. It states affirmatively that certain non-adversarial parties under the pleadings are nevertheless bound upon certain issues, but does not state the negative—as the 1942 version did—as to which parties are not so bound.

---

[2] The appropriate citations to the record appear in detail in Nevada's Brief in Opposition to the Tribe's Petition for a Writ of Certiorari filed in this same action, No. 82-38, at pp. 3-5, and Appendix A thereto.

The section of *Moore's Federal Practice* relied on by the United States hurts its cause. Moore speaks of res judicata between "co-parties", but the fact that status is not determined by the pleadings is illustrated by the following statement: "A person who is joined as a party defendant under the governing practice, when his interest in the subject matter of the suit is parallel to the plaintiff's and adverse to the interest of the other defendant, is an adversary of his codefendant, and the resulting judgment is binding between them." 1B *Moore's Federal Practice* ¶ 0.411[2], at p. 1284 (footnote deleted).

In this regard, it should be noted that the Tribe mixes into its discussion of res judicata a number of references to the requirements of due process. Aside from the fact that the Tribe was fully accorded due process, both by the Government's representation[3] and by notice and an opportunity to defend on an individual basis, due process is an issue not properly before the Court. Neither in its listing of issues in the Ninth Circuit nor in its Questions Presented to this Court did the Tribe cite to due process, the United States Constitution, or any provision thereof. *See* Rule 21.1(a) of the Rules of this Court.

The Tribe argues (p. 13) that the simple solution to its problem would have been to join the Tribe and the Newlands Project beneficiaries as parties to the *Orr Ditch* litigation. First, this requirement would negate the general rule that the United States can represent diverse interests without joining all of those interests as parties.[4]

---

[3] See District Court's Finding of Fact 31 and Conclusion of Law 6 (App. 191a-192a), which were not overruled by the Court of Appeals.

[4] *E.g.*, Colorado River Water Conservation District v. United States, 424 U.S. 800, 805-813 (1976); Arizona v. California, 373 U.S. 546, 595-608 (1963); Heckman v. United States, 224 U.S. 413, 442-447 (1912); United States v. Minnesota, 270 U.S. 181, 193-194 (1926); United States v. California and Oregon Land Co., 192 U.S. 355, 358 (1904); see also Jicarilla Apache Tribe v. United States, 601 F.2d 1116, 1125-33 (10th Cir.), cert. denied, 444 U.S. 995 (1979).

Equally important, however, is the proposition, as noted elsewhere,[5] that the Tribe could not have been joined unless it acceded to the joinder. It is one thing to state, as the Tribe does, that it had the capacity to appear if it chose to do so; it is quite another to conclude that it could have been forced to join as an indispensable party.

Both Nevada and Judge Schroeder in dissent below have argued that if the time-honored rule of adversity in water rights cases is to be amended, Congress should be the amending agency, particularly since this matter has been specifically brought to Congressional attention. The Tribe concedes that the problem has been probed in Congressional oversight hearings. The Tribe argues, however, that "[c]ourts are the traditional forums for adjudicating water rights and for determining the preclusive effects of prior judgments" (p. 16). This Court has made clear in a number of analogous situations that Congress should be looked to whenever it can relieve the federal courts of judgmental and policy matters properly within the legislative domain.[6]

Both the Tribe and the United States argue that this case is in an interlocutory posture. Even if it were, of course, that would not defeat this Court's jurisdiction. Stern & Gressman, *Supreme Court Practice*, at 301-302 (BNA 5th ed. 1978), and cases there cited. The fact is,

---

[5] See Nevada's Brief in Opposition to the Tribe's Petition for a Writ of Certiorari in No. 82-38, at p. 8.

[6] See, *e.g.*, Rostker v. Goldberg, 453 U.S. 57, 64-65 (1981); Fullilove v. Klutznick, 448 U.S. 448, 472 (1980) (plurality opinion); Harris v. McRae, 448 U.S. 297, 318 (1980); Diamond v. Chakrabarty, 447 U.S. 303, 317 (1980); United States v. Rutherford, 442 U.S. 544, 555 (1979).

Ten years ago, when this Court declined to exercise its original jurisdiction in this case, it noted that Congress had under consideration bills relating to the matter then being presented by the Solicitor General. United States v. Nevada, 412 U.S. 534, 537 (1973).

however, that the Ninth Circuit has definitively and finally decided the issue that is of paramount importance in this case—whether water rights adjudicated by a federal court to a party in an all-inclusive quiet title litigation are fixed inter se so as to provide res judicata protection to right holders in privity to that party. The 16 States that are so concerned about the Ninth Circuit ruling do not regard that ruling as interlocutory. They are worried about its effect here and now. Moreover, some of these States have correctly pointed out that the decision below has dangerous ramifications reaching beyond water rights adjudications. The viability of all final decrees to which the United States has been a party in a representative capacity has been jeopardized. These States cannot wait another ten to twenty years to have this issue put to rest.[7]

The Court of Appeals' res judicata ruling will not, as argued by the United States, be rendered moot, no matter what is decided on remand. The reopening of a judicially established decree long relied upon by the parties will be a fact—and one to which other courts can look for guidance. It is the reopening of the case and the remand itself that will cause the harm.

The United States argues (p. 15) that other pending lower court litigations may result in lessening or eliminating the apparent hardship to the Newlands Project families under the Ninth Circuit ruling. This argument

---

[7] The Tribe makes reference to alleged waste, excessive agricultural diversions, and the failure to conserve water in the Newlands Project. It is noteworthy that no record citations—in fact, no citations of any kind—are offered to support these references. Nor could they be. The waters awarded under *Orr Ditch* have meant survival—in terms of irrigation, agriculture, water facilities, plants, recreation, schools, and the like—for hundreds of thousands of people living in the area. See the District Court's order entered April 2, 1976, printed as an Appendix to the "Brief for Respondent Sierra Pacific Power Company in Opposition," filed in No. 82-38.

would appear to be but another attempt to revamp and resurrect the discredited theory that the fishery claim could be superimposed on the river with little or no harm to existing rights.[8] Furthermore, none of the cases cited by the Government has anything to do with establishing a *Winters* right for fishery purposes for the Pyramid Lake Reservation.[9]

---

[8] The "no harm" theory was rejected below. Nev. App. p. 191a.

[9] United States v. Alpine Land and Reservoir Co., 503 F.Supp. 977 (D. Nev. 1980), appeal pending before the Ninth Circuit Court of Appeals, is a quiet title action filed by the United States to establish the water rights for the Newlands Project from the Carson River. There are no claims for Indian rights, and the Tribe is not a party. TCID is a party. The Solicitor General speculates in his argument that the Ninth Circuit may find the District Court fact findings clearly erroneous and change the water duty of the project from the Carson River. However, in the Alpine case, which has been pending in the lower courts since 1925, no water rights of the Tribe are at stake.

TCID v. Secretary of Interior, pending in the District Court of Nevada, is limited to the question of whether TCID's contract to operate the Newlands Project was validly terminated by the Secretary of Interior. Again, no water rights of the Tribe are at stake.

Carson-Truckee Water Conservancy District v. Watt, 537 F.Supp. 106 (D. Nev. 1982), still pending in that court, involves an interpretation of the Washoe Project Act, 43 U.S.C. § 614, *et seq.* The obligations of the Secretary of Interior in connection with the use of the waters impounded in the Stampede Reservoir are at issue. No water rights of the Tribe are at stake.

Pyramid Lake Tribe v. Morton, 354 F.Supp. 252 (D.D.C. 1973), dealt with administrative regulations pertaining to the Newlands Project. The parties to this case were limited to the Tribe and certain federal defendants. Once again, no water rights of the Tribe were at stake.

The Tribe also cites (p. 7) matters pending in the Orr Ditch case. The Water Master's Petition will in no way change the rights of Pyramid Lake. The Petition to change the unused portion of the Tribe's agricultural right to a right for fishery purposes would not increase the quantity of water decreed for the reservation.

Indeed, the number of pending litigations serves to underscore the need for the proper application of res judicata. Contrary to the assertions made in opposition to the Nevada and TCID petitions, if the *Winters* fishery claim against the Nevada waters can be resolved on the basis of res judicata, as the Ninth Circuit should have held, justice and judicial economy will be served, not only by avoiding the costly and extended remand trial, but also by reaffirming that the rights declared in the *Orr Ditch* Decree are in fact the water rights of the respective parties.

The United States is disingenuous at best in arguing (p. 19) that the Ninth Circuit was merely allowing "an adjustment" between various uses decreed to the United States in *Orr Ditch*. To adopt such reasoning would be blinking reality. The United States, as such, is not a recipient of these waters. Nor would the *remedy* resulting from any remand run against the United States. Thousands of farmers and other water users who are beneficiaries of the Newlands Project are the recipients, and the Tribe seeks to be a greater user than it is. The United States, following its representation of both groups in *Orr Ditch*, is now at best a stakeholder. The Solicitor General's position that nothing more is involved here than an intra-United States "adjustment" of uses demonstrates why review of this Court is essential, for such an "adjustment" could be made to apply to every water rights case to which the United States has been a party in its representative capacity.

Similarly revealing is the astounding statement by the Solicitor General (p. 20) that the Tribe and the Newlands Project users were really "co-plaintiffs" in this case. Of course, it is hard to square this statement with the Tribe's argument that it was not even aware of the case, much less a party to it. But putting that to one side, the statement dramatically emphasizes the need for a reversal, because if totally adverse interests can become

"co-plaintiffs" by a simple juggling of the pleadings, then something is very wrong in this type of litigation and needs immediate correction.

Finally, the tribe contends (p. 20) that Nevada lacks standing to petition for certiorari due to the State's dismissal from the action in its *parens patriae* capacity. The Tribe's contention is without merit, since Nevada has always had standing to represent its citizens as *parens patriae* insofar as the State's quasi-sovereign interests are concerned. *See, e.g., Hawaii* v. *Standard Oil Co. of California*, 405 U.S. 251, 257-260 (1972), and cases there cited. In the District Court, the United States and the Tribe contended that the doctrine of *parens patriae* should be applied so as to bind individual landowners by a judgment against the State. *See, e.g.*, Tribe's contention, Record pp. 2346-51. Nevada's position was that it was properly *parens patriae* only in connection with the quasi-sovereign interests it sought to raise. Record p. 1959. When the District Court granted Nevada's motion to dismiss the State as *parens patriae*, the Court's order of dismissal was, therefore, not directed to dismissal as to Nevada's quasi-sovereign interests—which a State may always assert whenever it chooses to do so (*Hawaii, supra*)—but rather was designed to prevent a judgment against the State of Nevada from binding individual property rights. This Court recognized when this matter was here before in the form of an attempted original suit that Nevada had a right to appear *parens patriae*. *United States* v. *Nevada*, 412 U.S. 534, 539 (1973).

Orr Ditch was begun in 1913, a TRO was entered in 1926, and a final judgment handed down in 1944. The present action was filed in 1973. Thus, if this case is regarded as merely an extension of *Orr Ditch*, in that the Respondents are attempting to open up and change the rights awarded in that case, the result is an unhinging of litigation that has been in process for 69 years. Even

if the instant case is looked at in isolation, it is now 9 years old. It is ironic that the United States now argues that the best course of action for 1982 is more litigation, even when the primary issue of importance, the *Winters* right claim for fishery purposes, might once and for all be resolved. We submit that no remand is necessary.

This case, unfortunately, is not unique. There are any number of decrees which could be reopened on the basis of the decision below—cases in which the United States acted in its representative capacity and in which trial courts attempted to issue the broadest, most comprehensive declaration of rights possible. If such a reopening can occur merely on the basis of how parties happen to have been aligned in the pleadings, we will have returned to a different era, when form and not substance controlled. This would be a particularly harsh result for the many thousands of users whose very life-blood—water—would be dramatically and adversely impacted by the remand mandated by the court below.[10]

---

[10] The Congressional hearings at which representatives of the Tribe appeared and at which the Orr Ditch proceedings were discussed reflect that in the time frame 1942-1943, the Tribe was comprised of about 560 Indians, representing 275 adults and 70 families. Ex. U-543 at pp. 9, 24, 25. Petitioner does not believe that these figures for the reservation have materially changed since that time period.

Respectfully submitted,

RICHARD H. BRYAN
Attorney General of Nevada
Supreme Court Building
Carson City, Nevada 89701
(702) 885-4170

E. BARRETT PRETTYMAN, JR.*
Special Deputy Attorney General
815 Connecticut Avenue, N.W.
Washington, D.C. 20006
(202) 331-4685

LARRY D. STRUVE
Chief Deputy Attorney General
Supreme Court Building
Carson City, Nevada 89701
(702) 885-4170

JOHN W. HOFFMAN
HAROLD A. SWAFFORD
Special Deputies Attorney General
290 South Arlington Avenue
P.O. Box 187
Reno, Nevada 89504
(702) 332-4081

Attorneys for Petitioner

* Counsel of Record